

# Public Land and Resources Law Review

---

Volume 0 Case Summaries 2017-2018

---

## Murr v. Wisconsin

Nathan A. Burke

*Alexander Blewett III School of Law at the University of Montana, [nathanaburke@gmail.com](mailto:nathanaburke@gmail.com)*

Follow this and additional works at: <https://scholarship.law.umt.edu/plrlr>



Part of the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Burke, Nathan A. (2017) "Murr v. Wisconsin," *Public Land and Resources Law Review*: Vol. 0 , Article 8.  
Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss8/8>

This Case Summary is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Public Land and Resources Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

***Murr v. Wisconsin*, 137 S. Ct. 1933 (2017)**

**Nathan A. Burke**

In *Murr v. Wisconsin*, the Court redefined how to determine private property for a regulatory taking under the Fifth Amendment. Previously, courts have primarily relied on state property principles to determine the relevant unit of property for a regulatory takings claim. However, in this case, the Court adopted a three-factor standard to determine the landowner's reasonable expectations regarding the treatment of their property. By relying on these factors rather than only on state laws, the Court created a litigation-specific definition of property that could potentially differ from state property boundaries. The three-factor standard may also give the government an unfair advantage in regulatory takings claims by considering state interests more than once in a takings analysis.

**I. INTRODUCTION**

The appellants in *Murr v. Wisconsin* were four siblings in the Murr family ("Murrs").<sup>1</sup> The appellees were the state of Wisconsin ("State") and St. Croix County ("County").<sup>2</sup> This case arose from state and local rules on the sale of land where the Murrs' property was located.<sup>3</sup> The rules prevented the Murrs from selling their adjacently owned lots separately.<sup>4</sup> The Murrs sued the State and the County arguing that the rules effected a regulatory taking by depriving the Murrs of all of the use of one lot because it could not be sold separate from the other lot.<sup>5</sup> The Circuit Court of St. Croix County granted summary judgement to the State, determining that the Murrs had not been deprived of all use of their property.<sup>6</sup> The Circuit Court concluded that the state and local property rules effectively merged the two lots and, under this regulation, the Murrs' property could still be used and sold as a single lot.<sup>7</sup> The Wisconsin Court of Appeals affirmed the decision.<sup>8</sup>

The United States Supreme Court affirmed the Court of Appeals in this decision, but changed the method for defining the relevant property boundaries when doing a takings analysis.<sup>9</sup> Instead of automatically relying on state and local rules to define property boundaries, the Court determined the relevant property to a takings analysis by examining three factors: (1) the state and local laws, (2) the physical characteristics of the

- 
1. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1940 (2017).
  2. *Id.* at 1941.
  3. *Id.*
  4. *Id.* at 1940.
  5. *Id.* at 1941.
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *Id.* at 1949.

property, and (3) the effect the regulation has on the value of the property.<sup>10</sup> Since these factors were in favor of considering the two lots as one, the Court ruled that the combined lot was the relevant property in this case, and therefore, the Murrs had not been deprived of all use of that property.<sup>11</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

By 1972, the Wild and Scenic Rivers Act required Wisconsin to develop a management program under for the federally designated St. Croix River.<sup>12</sup> In compliance with the federal requirement, Wisconsin developed various rules to protect this area.<sup>13</sup> The Murrs' property, which was located on the Lower St. Croix River, was subject to Wisconsin's "substandard lot rules."<sup>14</sup> Under these rules, lots with less than one acre of developable land ("substandard lots") could not be sold if they were adjacent and under common ownership.<sup>15</sup> A grandfather clause in the regulation allowed for the sale of adjacent substandard lots if the lots were separately owned on January 1, 1976, the effective date of the regulation.<sup>16</sup> The rules also included a clause that merged adjacent substandard lots under common ownership.<sup>17</sup> The rules also allowed the local zoning authority to grant variances from the rules in special cases.<sup>18</sup>

The Murrs' property consists of two adjacent substandard lots that were independently owned when the substandard lot rules came into effect.<sup>19</sup> Therefore, under the grandfather clause, the lots could be sold separately. The first lot ("lot F") had a cabin, and the second lot ("lot E") was undeveloped.<sup>20</sup> A decade after the Murrs acquired the two lots, they decided to move the cabin on lot F and sell lot E to fund the project.<sup>21</sup> However, because the adjacent lots were now under common ownership, the local and state regulations prohibited the sale of lot E separate from lot F.<sup>22</sup> The Murrs sought variances from the St. Croix County Board of Adjustment to allow the separate sale or use of the lots.<sup>23</sup> The Board denied the request and the state courts upheld the Board's decision based on the local rules prohibiting the sale of lot E separately.<sup>24</sup>

---

10. *Id.* at 1945.

11. *Id.* at 1949.

12. *Id.* at 1940 (citing 41 Fed. Reg. 26237 (1976)).

13. *Id.* (citing Wis. Stat. § 30.27(1) (1973)).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

The Murrs sued the State and County alleging the substandard lot rules amounted to a regulatory taking.<sup>25</sup> The Circuit Court concluded that the Murrs had not been deprived of all of the “use and enjoyment of their property” because the Murrs had many available options for developing and using the land.<sup>26</sup> Additionally, the court, considering the Murrs’ property as one single lot rather than two, found that the regulations did not significantly devalue the property.<sup>27</sup> On appeal, the Wisconsin Court of Appeals held that the takings analysis required that the court first determine the relevant property.<sup>28</sup> The court determined that the lots could not be analyzed separately because the Murrs could not have reasonably expected that they could develop the lots separately when the substandard lot rules effectively merge the two lots.<sup>29</sup> Therefore, the relevant property was the combined lot, and since the Murrs still had use of the lot, a taking had not occurred.<sup>30</sup> After the Supreme Court of Wisconsin denied discretionary review, the United States Supreme Court granted certiorari.<sup>31</sup>

### III. ANALYSIS

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, requires just compensation when the government uses private property for a public use.<sup>32</sup> While the Takings Clause does not expressly how to handle the burden of a regulation on private property, Supreme Court jurisprudence has shown that a regulation can be so burdensome that it becomes a taking.<sup>33</sup> The Court follows two guidelines for determining if a regulation is burdensome enough to become a taking. First, if a regulation prevents all economically beneficial or productive use of property, it will be considered a taking.<sup>34</sup> Second, a taking may still be found even when a regulation does not deprive property of all economically beneficial use based on an assessment of factors such as “(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.”<sup>35</sup>

---

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (citing *Zealy v. Waukesha*, 548 N.W.2d 528 (1996)).

29. *Id.*

30. *Id.* at 1941-42.

31. *Id.* at 1942.

32. *Id.* at 1942.

33. *Id.* at 1942 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

34. *Id.* at 1942-43 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citations omitted)).

35. *Id.* at 1943. (quoting *Palazzolo*, 533 U.S. 617 (citations omitted)).

### A. The Majority Opinion

The central question before the Court was how to define the relevant unit of property for determining whether a regulatory taking has occurred.<sup>36</sup> The Court will use the change in value of the relevant property due to the regulation in question to determine if the government action effects a taking.<sup>37</sup> The Court stated that two concepts are important to defining the relevant property for a regulatory taking inquiry.<sup>38</sup> First, a parcel should not be split up into artificial segments, such as “air rights,” to determine if the government deprived the owner of their rights in one segment of the parcel, but rather the parcel should be considered as a whole.<sup>39</sup> Second, allowing state and local property regulations to define the unit of property in question would preclude landowners from challenging regulations that defined property boundaries inconsistently with “investment-backed expectations.”<sup>40</sup>

The State and the Murrs both asked the Court for formalistic rules to determine the unit of property for considering the value lost due to the substandard lot rules.<sup>41</sup> The State argued that the unit of property should be defined entirely by state law, which combined the Murrs’ property into one unit.<sup>42</sup> The Court rejected the State’s argument, stating that it would leave “landowners without recourse against unreasonable regulations” that define property boundaries.<sup>43</sup> The Murrs argued that the relevant property should be defined only by state lot lines, which would allow the economic damage of not being able to sell lot E to be considered without taking into account the change in value to lot F.<sup>44</sup> The Court also rejected the Murrs’ argument because property lines are created by state laws, and therefore, the Murrs’ requested that the Court credit only certain state law that favored their interests.<sup>45</sup> The Court concluded that formalistic rules suggested by the State and Murrs did not properly address the reasonable expectation of the landowner.<sup>46</sup> Instead, the Court used a multifactor standard to determine what a landowner’s reasonable expectation would be regarding the treatment of their property.<sup>47</sup>

First, the Court gave substantial weight to how the land is bound by state and local law.<sup>48</sup> The Court determined that a reasonable restriction

---

36. *Id.* at 1943.

37. *Id.* at 1943.

38. *Id.* at 1944.

39. *Id.* (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002)).

40. *Id.* at 1944-45 (citing *Palazzolo*, 533 U.S. at 617).

41. *Id.* at 1946.

42. *Id.*

43. *Id.*

44. *Id.* at 1947.

45. *Id.*

46. *Id.* at 1946.

47. *Id.* at 1945.

48. *Id.* at 1948.

predating a landowner's acquisition weighs in favor of a reasonable expectation that the land is subject to that restriction.<sup>49</sup> In this case, the substandard lot rules only applied to the Murrs after the Murrs brought the two lots under common ownership.<sup>50</sup> Murrs' voluntary conduct of acquiring the two lots which subjected them to the regulation, and the reasonableness of the regulation itself, lead the Court to conclude that a landowner could reasonably expect the properties be treated as one.<sup>51</sup>

Second, the Court looked at the physical characteristics of the land.<sup>52</sup> The two lots were contiguous on their longest edge which, the Court concluded, supported the treatment of the lots as one.<sup>53</sup> In addition, the Court determined that the Murrs could anticipate that their enjoyment of their property might be affected by regulations because the property was in an area that was subject to environmental regulations long before the Murrs' ownership.<sup>54</sup>

Third, the Court looked at the effect of the property rules on the value of the land.<sup>55</sup> The Court concluded that the restriction against selling lot E independently was mitigated by the value lot E added to the property as an integrated whole.<sup>56</sup> The merging of the lots, the Court noted, could provide more privacy and recreational space.<sup>57</sup> In addition, the Court found that the financial value of the property as a whole would be worth more than the combined sum of the lots if they were sold individually.<sup>58</sup> Again, the Court concluded that this factor weighed in favor of a reasonable expectation that the two lots would be treated as one unit.<sup>59</sup>

Using these three factors, the Court concluded that a landowner would reasonably expect the two lots be treated as one, and thus, the lower courts were correct when deciding that the Murrs did not suffer a taking.<sup>60</sup>

#### *B. Robert's Dissent*

Chief Justice John Roberts, in dissent, agreed with the final conclusion of the majority, but disagreed with the method of reaching it.<sup>61</sup> In part, the dissent argued that the majority unfairly weighed the government's regulatory interests over the rights of the landowner.<sup>62</sup> Roberts outlined the three steps in a takings analysis: (1) defining the relevant property, (2) determining if a taking has occurred, and (3)

---

49. *Id.*  
 50. *Id.* at 1948.  
 51. *Id.*  
 52. *Id.*  
 53. *Id.*  
 54. *Id.*  
 55. *Id.*  
 56. *Id.*  
 57. *Id.*  
 58. *Id.* at 1949.  
 59. *Id.*  
 60. *Id.*  
 61. *Id.* at 1950.  
 62. *Id.* at 1955.

calculating just compensation if a taking has occurred.<sup>63</sup> Roberts stated that the second step already takes “the economic impact of the regulation,” “investment-backed expectations,” and the “character of the governmental action” into consideration.<sup>64</sup> Roberts argued that by applying these factors to the definition of relevant property, the majority allowed government regulatory interests to be considered twice in the takings analysis instead of once.<sup>65</sup> “Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one ‘parcel,’ solely for purposes of resisting a particular claim.”<sup>66</sup>

#### IV. CONCLUSION

*Murr v. Wisconsin* marks a change in how the court will analyze a regulatory taking. When determining the relevant unit of property for a taking analysis, the Court relied on a three-factor standard to determine how a reasonable land owner would expect their property to be treated: (1) state and local law, (2) the physical characteristics of the land, and (3) the value loss due to the regulation. The Court then used the reasonable expectation determined to define the unit of property. In this case, the reasonable expectation based on these factors was that the Murrs’ property be treated as one parcel. Therefore, there was no regulatory taking because the Murrs had not been deprived of the entire property.

---

63. *Id.* at 1951.

64. *Id.* at 1957 (quoting *Penn Central*, 438 U.S.at 124).

65. *Id.* at 1955.

66. *Id.*